

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

GOVERNMENT EMPLOYEES)	
INSURANCE COMPANY @1156317, a)	
Foreign corporation, as subrogee of)	C.A. No. CPU4-10-000338
ALFREDA S. BUTCHER, and)	
ALFREDA S. BUTCHER, Individually)	
)	
v.)	
)	
SHAURICE BACON)	

Submitted: February 25, 2011
Decided: March 7, 2011

*Upon Consideration of Plaintiffs' Motion To
Enlarge Time for Service*
DENIED

Michael K. DeSantis, Esq., Law Office of Dawn L. Becker, Wilmington, Delaware, Attorney for Plaintiffs.

ROCANELLI, Judge.

This matter comes before the Court on the Motion to Enlarge Time for Service pursuant to Court of Common Pleas Civil Rule 6(b) filed by Plaintiff Government Employees Insurance Company @ 1156317, as subrogee of Alfreda S. Butcher, and Alfreda S. Butcher individually (collectively "Plaintiffs").

In consideration of Plaintiffs' Motion, the Court makes the following findings:

1. The instant matter involves a subrogation action to recover proceeds paid as a result of an automobile accident. Plaintiffs allege that on or about December 13, 2008, Defendant Shaurice Bacon's careless and negligent operation of his vehicle caused an automobile accident with Plaintiff Alfreda Butcher's vehicle and that, as a result, Plaintiffs sustained damages in the amount of \$ 6,780.33 for collision and personal injury protection benefits, car rental expenses and deductible.

2. Plaintiffs filed their complaint on January 19, 2010. According to Plaintiffs, pursuant to 10 Del. C. § 3112, on January 25, 2010, Plaintiffs mailed a notice and copy of the

complaint to Defendant via certified mail to his last known address of 217 Anthony Street, Bridgeport, CT 06605 but Defendant did not claim the certified mail.

3. Plaintiffs claim to have sent the notice and complaint via regular mail to Defendant. Plaintiffs do not provide the date the documents were sent by regular mail, nor is there a copy of an envelope reflecting a post-mark filed with the Court. Plaintiffs contend that the second notice was not returned.

4. In the instant motion, Plaintiffs also claim to have hired a special process server to effect service upon "both named Defendants." However, the docket does not reflect service by a special process server. Also, only one defendant is identified in the caption and Complaint, not multiple defendants.

5. On February 22, 2010, Plaintiffs filed an "Amendment to the Complaint" by and through an "Affidavit of Non-Residence" and sent a copy of that amendment to Defendant at the same address. It is unclear if Plaintiffs filed the proof of "non-receipt" within ten (10) days pursuant to Rule 4(h).

6. The 120 day period to effect service expired May 19, 2010. Once Plaintiffs filed the amendment on February 22, 2010, the docket reflects no further activity in this matter until the present motion filed February 9, 2011, nearly one year later.

7. Plaintiffs now move this Court pursuant to Rule 6(b) to enlarge the time to effect a "second long arm service" upon Defendant Bacon. Plaintiffs cite "excusable neglect" as the grounds for the motion. Plaintiffs maintain that they exercised diligence in attempting to locate Defendant. Plaintiffs further assert that they acted within the original 120 day period prescribed by the Rules.

8. Rule 4(j) provides that service must be made within 120 days after the filing of a complaint. If service cannot be made within that prescribed period, then the Court may dismiss the action without prejudice absent a showing of "good cause" as to why service could not be done. "Good cause" requires a showing of "good faith and excusable neglect, which means some reasonable basis for non-compliance within the time limit specified in the Rule."¹ Excusable neglect may exist where the plaintiff has made *all possible* efforts to comply with Rule 4, but has not been able to obtain service within 120 days.² Whether a party's failure to act constitutes excusable neglect is a matter of judicial discretion.³

9. The seminal case of *Cohen v. Brandywine Raceway Association*⁴ articulates the standard for "excusable neglect." To establish excusable neglect, the moving party must show (1) "a valid reason" must exist; and (2) the "neglect" at issue must be "neglect which might have

¹ *Franklin v. Millsboro Nursing and Rehabilitation Center, Inc.*, Graves, J., 1997 WL 363950 * 7 (Del. Super.) (citations omitted).

² *Id.* (citations omitted) (emphasis provided).

³ *Id.* (citations omitted).

⁴ 238 A.2d 320, 324-25 (Del. Super. 1968).

been the act of a reasonably prudent person under the circumstances.”⁵ Negligence and carelessness without a valid reason may be deemed insufficient.⁶ The Court may consider all of the surrounding circumstances to make its determination.⁷

10. Plaintiffs have not demonstrated excusable neglect. The record shows that Plaintiffs made two attempts to effectuate service within the 120 day period (January 19, 2010 to May 19, 2010). Once the affidavit was filed on February 22, 2010, Plaintiffs’ efforts halted as the 120 day deadline -- May 19, 2010 -- passed them by. Almost an entire year elapsed from the date Plaintiffs filed their Affidavit without any further attempt to advance the case. Counsel is silent as to why such a lapse occurred.

11. Plaintiffs cite *Miller v. State of Delaware Department of Public Safety*, as authority for their position.⁸ However, *Miller* is factually inapposite and thus distinguishable. In *Miller*, the Court examined whether the plaintiff’s mistaken reliance upon an inaccurate docket entry showing she had in fact perfected personal service constituted excusable neglect. The Court further assessed whether excusable neglect existed due to the plaintiff’s failure to serve all of the proper state officials as required by statute. The Court ultimately found that under the “totality of the circumstances,” the plaintiff had good cause to believe personal service had been achieved based upon the court’s docketing error.⁹ Further, excusable neglect existed as to the incomplete service upon the statutorily-mandated officials, as the plaintiff’s counsel erroneously believed he had already done so.¹⁰

12. In the present case, Plaintiffs merely assert that they have been diligent in their attempts to locate Defendant and “to perfect service on all Defendants in this action” within the original 120 day period. Contrary to *Miller*, Plaintiffs do not show mistaken reliance, attorney miscommunication, a typographical error or an evasive Defendant as grounds for their non-compliance.¹¹ Plaintiffs must present to the Court more than conclusory allegations. Plaintiffs have not proffered details as to the nature of the diligent and/or good faith efforts expended to locate the defendant. Therefore, there is no basis upon which this Court can conclude there was excusable neglect.

13. Plaintiffs are correct that public policy favors litigants proceeding with cases on the merits.¹² However, Plaintiffs must do their part too. While diligent efforts to comply with the rule may demonstrate excusable neglect, “half-hearted efforts by counsel to perfect service do not.”¹³ Plaintiffs do not explain why this case languished on the docket for almost one year

⁵ *Id.* at 324-25.

⁶ *Id.* at 325.

⁷ *Id.*

⁸ *Miller v. State of Delaware Department of Public Safety*, Herlihy, J., 2009 WL 1900394, *5 (Del. Super.).

⁹ *Id.* at *1.

¹⁰ *Id.*

¹¹ *Id.* at *5; see also *Franklin*, 1997 WL 363950 at *7-8.

¹² *Id.*

¹³ *Id.* (citing *Anticaglia v. Benge*, 2000 WL 145822, at *2 (Del. Super.)).

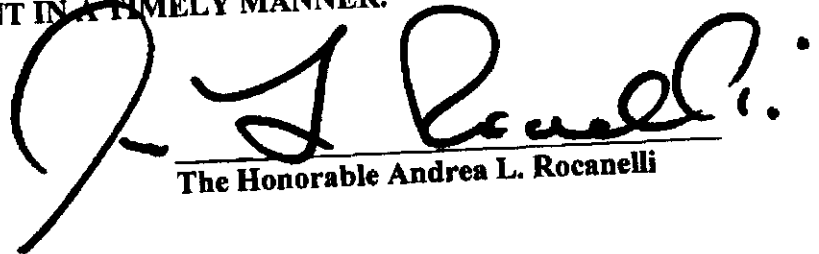
until this motion was filed. Plaintiffs have not demonstrated diligent and reasonable efforts to locate Defendant and serve process.

The Court concludes that Plaintiffs have failed to demonstrate excusable neglect and have failed to demonstrate that Plaintiffs exercised diligence to serve process upon Defendant within the 120 day time period.

NOW, THEREFORE, IT IS HEREBY ORDERED this 7th day of March, 2011:

1. PLAINTIFFS' MOTION TO ENLARGE THE TIME TO SERVE PROCESS IS
HEREBY DENIED; and

2. THIS ACTION IS HEREBY DISMISSED FOR PLAINTIFFS FAILURE TO
SERVE PROCESS ON DEFENDANT IN A TIMELY MANNER.



The Honorable Andrea L. Rocanelli